

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

MISTY DAWN RIVERA-CARTER,  
*Appellant.*

No. 2 CA-CR 2015-0058  
Filed April 22, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

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Appeal from the Superior Court in Pima County

No. CR20142804001

The Honorable Danelle B. Liwski, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By David A. Sullivan, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Harriette P. Levitt, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, appellant Misty Rivera-Carter was convicted of second-degree burglary, theft, theft of a credit card, computer tampering, and forgery. The trial court found she had one historical prior felony conviction and sentenced her to a combination of concurrent and consecutive, enhanced terms of imprisonment totaling 17.5 years. On appeal, Rivera-Carter argues the evidence was insufficient to support her conviction for burglary. We affirm her convictions and sentences.

¶2 We review de novo a question of sufficiency of the evidence. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

**Background**

¶3 In January 2013, Rivera-Carter moved into a halfway house managed by L.N. Recognizing that Rivera-Carter was having a difficult time finding employment, L.N. hired her to perform light housework at L.N.’s home. The two women became friends, and L.N., who owned clothes and shoes of two sizes, allowed Rivera-Carter to try on or borrow clothes or shoes that might fit her. When L.N. left her job at the halfway house and purchased a new home, Rivera-Carter helped her unpack her belongings there, and she was

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thus familiar with what L.N. and her husband owned and also knew where things were located within the house.

¶4 By mid-summer 2013, contact between the two women had waned, and L.N. eventually stopped hearing from Rivera-Carter. But on the morning of October 28, 2013, L.N. received a text message from Rivera-Carter, reporting that she was worried about her job and asking about L.N.'s work schedule that day. L.N. replied that she would be working from one to nine p.m. but could meet at Rivera-Carter's residence before then. When L.N. arrived there, however, Rivera-Carter was not at home, and she did not answer L.N.'s telephone call. That evening, L.N.'s husband called her at work to tell her their house had been burglarized. An estimated \$60,000 worth of property had been stolen, including L.N.'s wedding ring and all her other jewelry, a safe, electronic equipment, and an expensive watch belonging to her husband. In addition, some of L.N.'s clothing was missing, much of it previously determined, during social visits, to fit Rivera-Carter. Also missing were items Rivera-Carter had left with L.N. for safekeeping, had lent to L.N., or had left in L.N.'s home on previous occasions.

¶5 The safe that was taken from the home had contained, among other items, a home improvement store credit card that had never been used and a checkbook. Two days after the burglary, the credit card was used at two stores, and images from one store's video-surveillance system showed Rivera-Carter using the credit card, signing the receipt, and then sliding it to the man standing behind her in line. The man then used the card to purchase additional items. During a telephone call made from jail after her arrest, Rivera-Carter asked the person on the line if he had sold "the ring" and argued she was entitled to one-third of the proceeds from its sale; in another call, she gave instructions on how and to whom to sell "the watch." An attempt was also made to cash one of the stolen checks, made out to someone L.N. recognized as one of Rivera-Carter's friends.

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**Discussion**

¶6 “A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein.” A.R.S. § 13-1507(A). On appeal, Rivera-Carter argues that no evidence established that she had entered L.N.’s residence on the date of the burglary, noting: “There were no fingerprints. There was no DNA. There was no confession.” But “in reviewing the sufficiency of the evidence, we do not distinguish circumstantial from direct evidence.” *State v. Borquez*, 232 Ariz. 484, ¶ 11, 307 P.3d 51, 54 (App. 2013).

¶7 We conclude substantial, circumstantial evidence supported a finding that Rivera-Carter entered the home with the intent to commit theft. The evidence suggested some of the property taken had particular significance to Rivera-Carter, who knew where it could be located in the home, and only those areas had been disrupted by the burglary.

¶8 Moreover, even had the jury concluded the evidence was insufficient to prove Rivera-Carter had personally entered the home, it readily could have found her guilty as an accomplice. As the state points out, the jury was specifically instructed on an accomplice theory of liability.<sup>1</sup> In her reply, Rivera-Carter argues

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<sup>1</sup>The jury was instructed as follows:

“Accomplice” means a person, who, with the intent to promote or facilitate the commission of the offense, does any of the following:

1. Solicits or commands another person to commit the offense; or
2. Aids, counsels, agrees to aid, or attempts to aid another person in planning or committing the offense; or

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she “was not charged with burglary under accomplice liability[, but] was charged as a principal.” She contends the state has waived any argument regarding accomplice liability because it was first raised on appeal. According to Rivera-Carter, the accomplice-liability instruction “was not presented in the context of [her] complicity in the burglary. It was presented in the context of her complicity in the use of stolen property after the burglary.”

¶9 We cannot assess the accuracy of these assertions with respect to the state’s closing arguments because Rivera-Carter did not include a transcript of those arguments in the record on appeal. *See* Ariz. R. Crim. P. 31.8(b)(2)(ii) (“the record of voir dire of the jury and the opening and closing arguments of counsel” at trial “shall not be included” in the record on appeal “unless specifically designated by a party”); *cf. State v. Villalobos*, 114 Ariz. 392, 394, 561 P.2d 313, 315 (1977) (appellate court presumes testimony or evidence not included in record on appeal supported trial court’s rulings). Also, contrary to Rivera-Carter’s argument, when the prosecutor requested the accomplice-liability instruction, she told the trial court she intended to argue Rivera-Carter was guilty of burglary as an accomplice, even if the jury “[didn’t] find that she went to the house.” The state was not required to charge accomplice liability in the indictment, *State v. McInelly*, 146 Ariz. 161, 162, 704 P.2d 291, 292 (App. 1985), and we find nothing in the record to suggest the state waived this theory of criminal liability, which is amply supported by the record.

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3. Provides means or opportunity to another person to commit the offense.

A defendant is criminally accountable for the conduct of another if the defendant is an accomplice of such other person in the commission of the offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.

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¶10 Substantial evidence supported Rivera-Carter's conviction for second-degree burglary. Accordingly, we affirm her convictions and sentences.